LOH HOOT YEANG

v.

DERRICK EDWIN DAVID

COURT OF APPEAL, PUTRAJAYA
ABDUL KADIR SULAIMAN JCA
RICHARD MALANJUM JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: P-02-989-2003]
25 JANUARY 2006

CONTRACT: *Specific performance - Sale and purchase of property - Whether there was a concluded contract - Whether merely a tenancy agreement - Estoppel - Limitation - Whether claim by respondent time-barred*

LIMITATION: *Specific performance - Property, sale and purchase of - Whether there was a concluded contract - Estoppel - Whether claim by respondent time-barred*

This was an appeal by the appellant against the decision of the learned High Court judge giving judgment in favour of the respondent in an action for specific performance of a contract brought by the respondent against the appellant. The appellant was the registered owner of a house ('the said house') that the respondent had occupied since September 1970 and which the respondent claimed had been sold to him. The learned judge found that there was a binding sale and purchase contract between the parties after considering all the evidence in the case. The appellant submitted essentially on two grounds, namely: (i) that the learned judge's finding on the evidence that there was a concluded contract of sale and purchase and not merely a tenancy of the said house was not justified; and (ii) that the respondent' claim was barred by limitation as it was brought against the appellant only after the notice to quit was issued on 15 February 2000, some 23 years and seven months after the respondent's right of action accrued.

Held (dismissing the appeal)
Per Nik Hashim JCA:

(1) The learned judge was correct in finding that the contract of sale and purchase existed, not only on the correspondence, but also on the conduct of the parties. It was to be noted

that the relationship of the appellant and the respondent to each other, although seemingly informal, was a commercial relationship entered into for business reasons of ultimate profit. To describe their relationship as that of a mere landlord and tenant in the context of the available evidence, both oral and documentary, was just implausible. In addition to there being a contract, the appellant, by his acts and omissions, was estopped from contending that there was no contract of sale and purchase of the said house. (paras 12 & 14)

(2) In regard to the issue of limitation, the instant agreement was entered into in August 1970, and although there were opportunities for completion either in 1975 or 1976, the threat to the respondent's right only came on 15 February 2000 when the appellant asserted his claim to vacant possession by issuing the letter to quit. That letter clearly and unequivocally showed that the appellant chose to treat the respondent as a mere tenant and not as a purchaser under the agreement. In the circumstances, the learned judge was right in treating the date of the letter to quit as being the decisive date and as the writ was filed on 30 May 2000, the respondent's claim was obviously not time-barred. Further, by reason of the learned judge's finding on estoppel and that it would be unconscionable on the part of the appellant to deny a contract of sale and purchase, it would likewise be unconscionable on his part to try and use the Limitation Act 1953 to defeat the respondent's cause of action. (paras 17 & 18)

(3) Therefore, on the facts of this case, there was a valid contract of sale and purchase of the said house that the parties must honour. The learned judge was right in allowing the respondent's claim. (para 19)

Bahasa Malaysia *translation of headnotes*

Ini adalah rayuan perayu terhadap keputusan yang arif hakim Mahkamah Tinggi kerana memberikan penghakiman kepada responden dalam tindakan pelaksaan spesifik yang dibawa oleh responden terhadap perayu. Perayu adalah pemilik berdaftar sebuah rumah yang diduduki responden sejak September 1970 ('rumah tersebut'), yang dikatakan oleh responden sebagai telahpun dijual kepadanya. Yang arif hakim mendapati bahawa, berdasarkan keterangan kes, terdapat satu perjanjian jual beli yang mengikat di antara pihak-pihak. Perayu berhujah atas dua alasan pokok, iaitu:

(i) bahawa dapatan yang arif hakim bahawa di atas keterangan terdapat suatu kontrak jual beli yang sempurna, dan bukan semata-mata suatu tenansi terhadap rumah tersebut, adalah tidak berjustifikasi; dan (ii) bahawa tuntutan responden telah dihalang oleh had masa, kerana hanya dibawa terhadap perayu selepas notis mengosongkan dikeluarkan pada 15 Februari 2000, iaitu 23 tahun 7 bulan selepas hak mengambil tindakan terakru kepada responden.

Diputuskan (menolak rayuan)
Oleh Nik Hashim HMR:

(1) Yang arif hakim betul dalam mendapati bahawa kontrak jual beli wujud, bukan semata-mata berdasarkan surat-menyurat, tetapi juga berdasarkan kelakuan pihak-pihak. Harus diingat bahawa perhubungan di antara perayu dan responden, walaupun kelihatan informal, adalah merupakan perhubungan komersial yang dimasuki atas sebab-sebab perniagaan dan untuk mengaut keuntungan. Mengatakan bahawa hubungan mereka, dalam konteks keterangan lisan dan dokumentari yang ada, hanyalah hubungan tuantanah dan penyewa, adalah sesuatu yang tak diterima akal. Selain dari kewujudan kontrak, perayu, melalui kelakuan dan ketinggalannya, diestop dari mengatakan bahawa tidak wujud kontrak jual beli bagi rumah tersebut.

(2) Berkaitan isu had masa, perjanjian semasa telah dimeterai pada Ogos 1970. Walaupun terdapat peluang untuk ianya disempurnakan sama ada pada 1975 atau 1976, ancaman terhadap hak responden hanya berbangkit pada 15 Februari 2000 bilamana perayu membuat tuntutan milikan kosongnya dengan mengeluarkan notis mengosongkan. Surat tersebut menunjukkan dengan terang dan jelas bahawa perayu memilih untuk menganggap responden hanya sebagai seorang penyewa dan bukannya sebagai seorang pembeli di bawah perjanjian. Dalam keadaan sedemikian, yang arif hakim betul apabila menganggap tarikh surat untuk mengosongkan sebagai tarikh penentu. Ianya mengikut bahawa oleh kerana writ difailkan pada 30 Mei 2000 maka tuntutan responden tidaklah dihalang oleh had masa. Selain itu, mengambilkira dapatan yang arif hakim atas isu estopel dan bahawa adalah tidak patut bagi perayu menyangkal kewujudan kontrak jual beli, adalah juga tidak patut bagi perayu untuk cuba menggunakan Akta Had Masa 1953 untuk menolak kausa tindakan responden.

A **(3)** Oleh itu, berdasarkan fakta kes di sini, terdapat suatu kontrak jual beli yang sah rumah tersebut yang harus dihormati oleh pihak-pihak. Yang arif hakim betul apabila membenarkan tuntutan responden.

B **Case(s) referred to:**

Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219 HC ***(refd)***

Amalgamated Investment & Property Co Ltd v. Texas Commerce International Bank Ltd [1982] WLR 84 ***(refd)***

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd
C *[1994] 3 CLJ 133 SC* ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Charles Grenier Sdn Bhd v. Lan Wing Hong [1997] 1 CLJ 625 FC ***(refd)***

Commissioner for Religious Affairs Trengganu & Ors v. Tengku Mariam
D *Tengku Sri Wa Raja & Anor [1970] 1 MLJ 222* ***(refd)***

Diamond Peak Sdn Bhd & Anor v. DR Tweedie [1982] 1 MLJ 97 ***(refd)***

Nasri v. Mesah [1971] 1 MLJ 32 ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229 ***(refd)***

Legislation referred to:

E Evidence Act 1950, s. 115

For the appellant - Darryl SC Goon (Daphne Choy, Raja Eileen Soraya with him); M/s Raja, Darryl & Loh

For the respondent - Robert Lazar (Chan Ju Jin with him); M/s Shearn Delamore & Co

F

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-246-2000]

Reported by Suresh Nathan

G

JUDGMENT

Nik Hashim JCA:

Background

H

[1] This appeal is directed against the decision of Kamalanathan Ratnam, J delivered on 13 November 2003 and reported in [2004] 1 AMR 173 in an action for specific performance of a contract brought by the respondent before us as plaintiff against the
I appellant as defendant.

[2] Briefly, the facts are that the appellant was the registered proprietor of 2 lots of land together with 4 houses on Brook Road, Penang (the Brook Road property) one of which was house No. 13 (the said house). The appellant instructed the respondent to draw a layout plan to provide for the sub-division of the Brook Road property into 5 separate lots namely the 4 existing houses together with a vacant piece of land next to the said house. The respondent had been in occupation of the said house since September 1970 and claimed that the said house had been sold to him. The respondent first broached the subject of buying the said house when it had a sitting tenant. At the appellant's suggestion and to move the tenant out to house No. 7, the respondent on 20 April 1970 wrote a letter (the 20 April letter) requesting the appellant to consider his offer.

[3] The application for sub-division was submitted. However, the respondent was told by the City Council that it would only be approved if certain amendments were made. In light of the layout's amendment and the fact that it would be approved, the appellant firmed up the proposal to sell the said house to the respondent for RM60,000. The respondent accepted the appellant's offer. As the sub-division was still pending, it was agreed that pending the issuance of a separate title, the respondent would pay to the appellant a sum of RM500 per month, which at the appellant's request was described as rental. Although the respondent did propose that an agreement be drawn up and that he pay a 10% deposit, the appellant's response was that it was not necessary. The respondent did inform the appellant that he would be doing substantial renovations to the said house after taking possession and he was assured that he was free to do so. On 28 August 1970 the respondent wrote a letter (the 28 August letter) to the appellant confirming the agreement with regard to the said house. The letter reads as follows:

Premises at No. 13 Brook Road, Penang

This letter is to confirm the following items with regard to the above house.

1) I agree to purchase the above property complete with furniture and electrical appliances at the price of RM60,000;

2) I agree to rent the above premises fully furnished at a rental of RM500.00 per month as from September, 1970 until such time as the purchase price is paid.

A As both these items were agreed to by you in our last meeting, could you kindly let me know when I can move into the house.

I enclose herewith my cheque for RM500.00 being rental for the month of September 1970.

B **[4]** The respondent previously resided at No. 29, Brown Road (the Brown Road property) as a tenant of Sime Darby (Malaysia) with an option to purchase the Brown Road property. The respondent also owned a plot of vacant land next to the house. As a result of the agreement he had with the appellant, the C respondent terminated the Brown Road property's tenancy, gave up the option and sold his vacant lot of land to finance the renovations of the said house. The respondent took possession of the said house in September 1970 and only moved in five months later with his family and has since continuously resided there. The D respondent during this period had tendered the monthly payment of RM500 promptly. In February 1972, the respondent received a letter from the appellant architect enquiring whether he still had any interest in the Brook Road property. The respondent responded to this letter claiming that the said house had already E been sold to him. The architect did not reply but the appellant responded to the architect's letter denying that he sold the said house. The respondent by his letter of 22 April 1972 (the 22 April letter) reminded the appellant of the 28 August letter. The appellant however never responded to the said letter. The F respondent continued to reside at the said house and had carried out further renovations. The appellant, by a letter dated 15 February 2000 gave three months to the respondent to quit and vacate the said house.

G **[5]** Hence, the suit before the learned trial judge who after hearing witnesses and submissions from both sides, gave judgment in favour of the respondent granting the following orders:

(i) that there be a declaration that the respondent is and has H been in occupation of house No. 13, Brook Road, 10450 Penang ('the said house') pursuant to an agreement made sometime in August 1970 between the respondent as purchaser and the appellant as vendor whereby the appellant had agreed to sell and the respondent had agreed to purchase I the said house for a purchase price of RM60,000;

(ii) that the appellant to deliver the document of title to the said house free from encumbrances together with the requisite memorandum of transfer duly executed in favour of the respondent within 14 days from the date of the order herein upon the respondent's solicitors' undertaking to pay to the appellant the said purchase price of RM60,000 within 14 days from the receipt of the requisite documents referred to herein; and

(iii) that the appellant do pay to the respondent the costs of the proceedings herein.

[6] Before us, learned counsel for the appellant submitted essentially on two grounds, namely;

(i) that the learned judge's finding on the evidence that there was a concluded contract of sale and purchase and not merely a tenancy of the said house was not justified.

(ii) that the respondent's claim was barred by limitation as it was brought against the appellant only after the notice to quit was issued on 15 February 2000, some 23 years 7 months after the respondent's right of action accrued.

Was There A Binding Contract?

[7] The learned trial judge found as a fact that there was a binding sale and purchase contract between the parties. He made his finding after considering all the evidence of the parties in the case. The documentary evidence that strongly supports the respondent's case that there was a contract of sale and purchase was the three letters written by the respondent to the appellant, namely: the 20 April letter, the 28 August letter and the 22 April letter. The term of the 28 August letter is very clear in that there was a firm agreement between the respondent and the appellant for the sale of the said house at RM60,000. On receipt of the copy of the appellant's letter of 12 April 1972 addressed to the Architect Team 3 expressing "... I am surprised to read that the property had already been sold to him (the respondent) by agreement" the respondent by 22 April letter to the appellant, not only repeated what was stated in the earlier correspondence that he had found himself unequivocally to buy the said house at the quoted price but also reminded the appellant to the fact that:

(i) he had been making extensive renovations and improvements on the premises since September 1970;

(ii) he had sold his vacant land at the Brown Road property.

The appellant at that time could not deliver a separate title as the Brook Road property was in the process of being sub-divided. In this 22 April letter the respondent made it very clear that he was ready and willing to pay the purchase price in exchange for a transfer of the said house. He also offered to pay 10% deposit in the meantime.

[8] It is interesting to note that the appellant did not reply to any of these respondent's letters, a factor which the learned judge took into consideration in arriving at his finding. Besides, the appellant had admitted in his defence and in his testimony that the respondent had expressed an intention to purchase the said house.

[9] In the High Court, learned counsel for the appellant submitted:

> **Save that the Defendant (appellant) did agree to sell the said property to the plaintiff (respondent) for a sum of RM60,000** (whether subject to the plaintiff finding three (3) other buyers or not), the plaintiff has failed to prove all the other alleged terms of the sale and purchase agreement and that there was consensus ad idem in respect of the alleged terms. (emphasis added)

Although there was no concession in respect of the alleged terms, there was a concession that the appellant did agree to sell the said house to the respondent for a sum of RM60,000 which clearly shows that the parties had entered into what is called an "open contract". Such a contract is enforceable as if it was embodied in a document with all the attendant solemnity. In order to give it effect, the law will, acting out of necessity, imply terms into the contract for sale in order to make it work (*Charles Grenier Sdn Bhd v. Lan Wing Hong* [1997] 1 CLJ 625).

[10] We agree with the respondent that the probabilities of the case were clearly in favour of a finding that there was a concluded contract of sale and purchase as opposed to a mere tenancy. In arriving at this conclusion the learned judge applied the correct approach in evaluating the documentary evidence and had it

tested against the whole of the other evidence. He took into account the contemporaneous acts and deeds of the parties in coming to his decision. In *Tindok Besar Estate Sdn Bhd v. Tinjar Co.* [1979] 2 MLJ 229, Chang Min Tat FJ at p 234 had this to say regarding the judicial reception of evidence at a trial:

> For myself, I would with respect feel somewhat safer to refer to and rely on the *acts and deeds of a witness which are contemporaneous with the event* and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. *Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case.* (emphasis added)

[11] Moreover, the learned trial judge rejected the defence that there was merely a tenancy. He based his finding on the following factors:

(a) The language of the correspondence.

(b) The appellant's admission that there was a discussion of a sale.

(c) That the respondent was already a tenant at No. 29 Brown Road and owned the piece of land next to No. 29 house with an option to purchase. Why then would the respondent want to give up all those and move to the said house merely as a tenant?

(d) That the appellant moved the sitting tenant out of the said house when No. 7 house was already vacant clearly showing that the appellant was agreeable to the idea of the respondent moving in as a tenant and then purchasing the said house.

(e) That the sum of RM500 which the respondent had paid for over 30 years was never increased.

(f) That substantial renovations had been carried out over the years.

(g) That the appellant had never either by himself or through his agents visited the house even once, especially after he received the letter saying that the respondent had been making substantial improvements and renovations to the said house.

Thus, after having rejected the appellant's pleaded case that there was merely a tenancy, the learned judge concluded by saying:

> There is nothing in the evidence to negate the view that the nature and extent of the plaintiff's (respondent's) possession of No. 13, Brook Road, Penang, more particularly the extensive renovations effected, could only have been in pursuance of an agreement of sale as between the plaintiff (respondent) and the defendant (appellant).

[12] We agree with him. In *Diamond Peak Sdn Bhd & Anor v. D.R. Tweedie* [1982] 1 MLJ 97, Gunn Chit Tuan J (as he then was) at p 103 said:

> On the essential point of the intention of the parties, counsel cited the case of *Cranleigh Precision Engineering Ltd v. Bryant* and urged the court to consider what were the intention of the parties as manifested by the **construction of the documents in this case as well as the conduct of the parties** which must be taken into account.

The learned judge then continued at para I right:

> When parties negotiate with a view to contracting, as in this case, it could be hard to tell when an offer has been made and accepted …

And at p 104, he concluded:

> I agreed with counsel for the plaintiffs that where there is an informal or "open" contract, as in this case, which envisages the subsequent execution of a formal agreement the legal effect of that prior informal agreement depends on the intention of the parties which the court may, on the authority of such cases such as *Rossiter v. Miller, Branca v. Cobarro* and the classic statement of law by Parker J. in *Von Hatzfeldt – Wildenburg v. Alexander*, etc **find on the construction of the document as well as on the evidence relating to the conduct of the parties.** (emphasis added)

In *Ayer Hitam Tin Dredging Malaysia Bhd. v. YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 at headnote (1) it was held that:

> The existence of an agreement depends on the intention of the parties, who must be *ad idem*. It may be inferred from the language used, the parties' conduct having regard to the surrounding circumstances and the object of the contract. The court will generally apply an objective or reasonable man test.

Therefore, the learned judge was correct in finding that the contract of sale and purchase existed, not only on the correspondence, but also on the conduct of the parties. It is to be noted that the relation of the appellant and the respondent to each other, though seemingly informal, was commercial relation entered into for business reasons of ultimate profit. To describe their relationship as a mere landlord and a tenant in the context of the available evidence, both oral and documentary, is just implausible.

Estoppel

[13] In the case under appeal, estoppel had been pleaded. In dealing with estoppel that supports the existence of the contract, the learned judge considered the case law and the facts supporting the estoppel and came to these conclusions correctly:

> In the present situation the crucial question then is, was the defendant (appellant) entitled to stand by in silence when he must have known that the plaintiff (respondent) was proceeding on the assumption that he had an agreement and that the completion would only be a formality made as a matter of course by relying on his letter dated 22 April 1972. It is my judgment that it would be unconscionable for the defendant (appellant) having knowledge of all these to now say that there was no contract of sale …
>
> The defendant (appellant) had represented to the plaintiff (respondent) that the agreement would be honoured and that the plaintiff (respondent) was free to do as he liked including effecting renovations as soon as he had moved into No. 13 Brook Road. On this footing, I hold that there is representation by promise.
>
> There is no doubt that the plaintiff (respondent) himself assumed that a particular legal relationship then existed between him and the defendant (appellant), namely that the defendant (appellant) had agreed to sell the house to the plaintiff (respondent) and had told the defendant (appellant) so ...
>
> In my judgment that in the circumstances of this case the defendant (appellant) was under a duty to the plaintiff (respondent) to disclose the purported non-existence of the sale after he had received the letter of April 22, 1972. By not acting for over 28 years and then out of the blues, issuing a letter to quit, the conduct of the defendant (appellant) is unconscionable …

[14] These are findings which stand unchallenged. In *Amalgamated Investment & Property Co Ltd v. Texas Commerce International Bank Ltd* [1982] WLR 84 the English Court of Appeal held that:

> When parties in their course of dealing in a transaction have acted upon an agreed assumption that a particular state of facts between them is to be accepted as true, each is to be regarded as estoppel as against the other from questioning as regards that transaction the truth of the statement of facts so assumed.

(see also s. 115 of the Evidence Act 1950; *Bousted Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; *Commissioner for Religious Affairs Trengganu & Ors v. Tengku Mariam binti Tengku Sri Wa Raja & Anor* [1970] 1 MLJ 222). Thus, in addition to there being a contract, the appellant by his acts and omission is now estopped from contending that there was no contract of sale and purchase of the said house.

Limitation

[15] On the question of limitation, learned counsel for the appellant submitted that the title to the property was issued on 17 December 1975 and that it became free of encumbrances on 26 October 1976 and therefore, the respondent's cause of action accrued on these two dates.

[16] With respect, we do not agree with the submission. We agree with the respondent that those two dates are not dates when the breach occurred but are dates when there were opportunities for the appellant to complete the contract. The fact that it was not completed on those two dates does not mean that the respondent's cause of action accrued on those two dates. In *Nasri v. Mesah* [1971] 1 MLJ 32, the Federal Court decided that the purchaser's cause of action accrued from 14 October 1966 which was the date that the vendor had written to the purchaser asking him to hand over to her within 14 days from the date of the letter the grant of title in respect of the land and forbidding him to enter into the land or take any produce therefrom, although the agreement was entered into on 5 June 1947 during a moratorium which expired on 30 September 1949. The Court in that case ruled that for the purpose of limitation time begins to run from the date of any infringement or threat of infringement of the purchaser's right under the agreement. A cause of action on a contract accrues on the date of breach and in the case of actions founded on contract, the time runs from the breach.

[17] In the instant case, the agreement was entered into in August 1970, and although there were opportunities for completion either in 1975 or 1976, the threat to the respondent's right only came on 15 February 2000 when the appellant asserted his claim to vacant possession by issuing the letter to quit. That letter clearly and unequivocally shows that the appellant was choosing to treat the respondent as a mere tenant and not as a purchaser under the agreement. In the circumstances, the learned judge was right in treating the letter to quit as being the decisive date. As the writ was filed on 30 May 2000, obviously the respondent's claim was not time-barred.

[18] Further, by reason of the learned judge's finding on estoppel, and that it would be unconscionable on the part of the appellant to now deny a contract of sale and purchase, likewise it will be unconscionable on his part to try and use the Limitation Act 1953 to defeat the respondent's cause of action (see *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219).

[19] It is therefore our view that, on the facts of this case, there was a valid contract of sale and purchase of the said house which the parties must honour. The learned trial judge was right in allowing the respondent's claim. Accordingly, we dismiss the appeal with costs and order that the deposit be paid to the respondent to account of taxed costs.